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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~407.~~ 126

W. BASEY, JAMES McCABE, J. V. STAFFORD, W. WARNER, O. C. WARNER, S. CLEM, AND J. CLEM, APPELLANTS.

vs.

JOHN GALLAGHER, JAMES HORNBUCKLE, & SAMUEL MARSHALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED FEBRUARY 7, 1873.

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1 In third judicial district court, Lewis and Clarke County, Montana Territory.

JOHN GALLAGHER ET AL.
vs.
WILLIAM BASEY ET AL.

Be it remembered that among the proceedings, records, and pleadings had, made, and filed herein in the above-entitled cause, are the following, to wit:

On the 22d day of October, A. D. 1870, the plaintiffs filed herein their complaint, which is in the words and figures following, to wit:

In the district court, 3rd judicial district, Territory of Montana, and county of Meagher.

JOHN GALLAGHER, JAMES HORNBUCKLE, SAMUEL MARSHALL, plaintiffs,
against
W. BASEY, JAMES MCCABE, J. V. STAFFORD, O. C. Warner, Warner, S. Clem, and I. Clem, defendants.

Plaintiffs come, by Sample Orr, their attorney, and for cause of complaint allege that in the year 1866 they and their predecessors
2 took up ranches on public land belonging to the Government of the United States of America, for the purpose of settlement and cultivation, in the county of Meagher and Territory of Montana, situate on the Missouri River bottom, a short distance below a stream known as Avalanche. That for the purpose of raising crops of grain, vegitables, and hay it was and is necessary to have and procure water to irrigate said ranches. Plaintiffs further allege that at the time said ranches were taken up by the above-named plaintiffs and their predecessors the water of Avalanche was unappropriated by any person. That in the fall of the year 1866 these plaintiffs and their predecessors located, marked out, and commenced the construction of a watch-ditch to convey the water flowing down the stream known as Avalanche to their ranches, for the purpose of irrigating their said ranches; that they proceeded to finish the construction of the said ditch early in the year 1867, at great cost of labor and money, and appropriated five hundred inches of the water of the said Avalanche stream, at the place where the said ditch intersects the said stream, viz, a few rods from where the said Avalanche stream empties into the Missouri River, and proceeded to use the said water for the purpose of irrigating their said ranches. The plaintiff further alleges that afterwards the defendants, well knowing that these plaintiffs and their predecessors had appropriated said water and constructed said ditch for the purpose of irrigation, as aforesaid, pro-
3 ceeded to erect dams above the ditch of plaintiffs and turn out the water of the said Avalanche stream, thereby converting the water of said stream to their use, thereby preventing said water from flowing down said stream to the ditch of plaintiffs, rendering their said ranches almost entirely useless for the purpose of making crops of hay, grain, and vegitables, greatly to the damage of above plaintiffs. Therefore plaintiffs ask the court upon a final hearing of said cause to render a decree that the above-named defendants, their servants, agents, attorneys, and all persons acting under them, may be forever enjoined and restrained from interfering with the water of said stream so as to pre-

vent these plaintiffs from the use of five hundred inches at the head of their said ditch, and that the property to said five hundred inches aforesaid be decreed to these plaintiffs, and for such other and further relief as to the court may seem just and proper, and for their costs in this action.

SAMPLE ORR,
Att'y for Plaintiffs.

TERRITORY OF MONTANA,
County of Meagher:

John Gallagher, being by me first duly sworn, deposes and says, that he is one of the plaintiffs in the above-entitled action; that he has heard the complaint read, and has reason to believe and does believe that the matters as herein stated are true.

JOHN GALLAGHER.

Subscribed & sworn to before me this 22d day of October, A. D. 1870.
T. J. DAWES, *Clerk.*

4 On the 31st of October, A. D. 1870, the defendants filed herein their demurrer to the foregoing complaint, which is in words and figures following, to wit:

TERRITORY OF MONTANA,
County of Meagher, ss:

In the district court, 3rd judicial district, in and for the county and Territory aforesaid.

JOHN GALLAGHER ET AL., PLAINTIFFS,
vs.
WESLEY BASEY ET AL., DEFENDANTS.

Now comes the defendants, by E. W. Toole, their attorney, and demur to the complaint of the plaintiff, and for cause show unto the court here the following, to wit:

1st. Said complaint does not show that defendants have diverted any water from plaintiffs' ditch to their irreparable injury or damage.

2. Said complaint does not aver any diversion of water from plaintiffs' ditch to which they were entitled.

3. Said complaint does not show any wrongful diversion of the water claimed by plaintiffs.

4th. Said complaint does not show that the injuries complained of were committed within the time allowed by law for the institution of such action.

5. Said complaint does not show that any water was diverted by the plaintiffs which would otherwise been used by plaintiffs for any valuable purposes.

5 6th. Said complaint only alleges that said water was appropriated for the purpose of raising crops on said ranches, and does not show that such crops could be raised or were in any way injured.

E. W. TOOLE,
Att'y for Defendants.

On the 5th day of November, A. D. 1870, the plaintiffs filed herein their amended complaint, which is in words and figures following, to wit:

In district court, third judicial district, county of Meagher, Territory of Montana.

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

And now comes the above plaintiff, and for an amended complaint herein show unto this hon. court and allege: That in the year A. D. 1866 they and their predecessors in interest and possession took up certain ranches on public land of the United States of America situate in the said county of Meagher and Territory of Montana, and on which is known as the Missouri River bottom, and a short distance below a stream known as Avalanche; and that the said ranches were taken up for settlement and cultivation. And the said plaintiffs further allege that for the purpose of raising grain, hay, and vegitables, and the successful cultivation of the said ranches, it was then, and is now, necessary to have and procure water to irrigate said ranches. And the said plaintiffs further allege that from the year aforesaid to the present time these plaintiffs and their predecessors in interest and possession have owned, and occupied, and cultivated, and now own and occupy, the said ranches. And the said plaintiff further alleges that at the time the said ranches were so taken up as aforesaid, the water' flowing in the said Avalanche Creek or Gulch were unappropriated by any person, and were subject to appropriation, and that in the said year of 1866 these plaintiffs and their predecessors located, marked out, and commenced the construction of a water-ditch to convey the waters flowing down the said Avalanche Creek or Gulch to the said ranches of these plaintiffs and their predecessors for the purpose of irrigating the same, the said waters being then unappropriated, and were claimed as aforesaid; and that during the spring of the year A. D. 1867 these said plaintiffs and predecessors proceeded to complete and finish the said ditch at great cost and expenditure of labor and money, and thereby appropriated of the waters of the said Avalanche Gulch or stream for the purposes aforesaid five hundred inches of water, according to miners' measurement, which amount is necessary for the successful cultivation of said ranches; that the said ditch intersected with the said Avalanche Creek or Gulch, and took the water therefrom a short distance above where the same empties into the Missouri River; and that from the time of the completion of the said ditch until the date of the wrongful acts of the said defendants, hereinafter mentioned, the said plaintiffs and their predecessors used the said water so appropriated and claimed for the purpose of irrigating their said ranches, and were thereby enabled to cultivate and raise large and valuable crops of grain, hay, and vegitables; and the said plaintiffs further allege that afterwards, to wit, on the day of , A. D. 1867, and on the day of , A. D. 1870, and on days intermediate said dates, and subsequent to the said appropriation of these plaintiffs and their predecessors, the said defendants, well knowing the rights of these plaintiffs and their predecessors to the waters of said stream, proceeded to erect dams across the said Avalanche Creek or Gulch, and above the head of the ditch of these plaintiffs, and to construct ditches and turn out and divert the waters of the said stream, thereby wholly depriving these plaintiffs of the use and enjoyment of the said water, to their great and irreparable damage and injury—thereby rendering the said ranches of these plain-

tiffs almost entirely valueless, and preventing these plaintiffs from cultivating the same. And the said plaintiffs aver that if the waters of the said Avalanche Gulch or stream had been permitted, unobstructed by the said dams and ditches of the said defendants, to have
8 flowed down to the ditch of these plaintiffs, they would have had a sufficient supply of water to have irrigated their said ranches, and cultivated and raised valuable crops of grain, hay, and vegitables. Wherefore the said plaintiffs pray that they may have judgment for their costs of action; that upon the final hearing they may be decreed a perpetual injunction against the said defendants, their servants, agents, and employees, and all persons who may claim by, through, or under them, enjoining and restraining them from in any manner diverting or interfering with the said waters of the said Avalanche Gulch, or Creek, except as to what may be in excess of five hundred inches at the head of plaintiffs' ditch, and for such other or further relief as to the court may seem just and proper.

SAMPLE ORR,
SHOBER, CHUMASERO & CHADWICK,
Plaintiffs' Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Sample Orr, being first duly sworn, deposes and says, that he is one of the attorneys of the above-named plaintiffs; that he has heard the said amended complaint read and knows the contents thereof, that he has reason to believe, and does believe, the matters as therein stated to be true.

SAMPLE ORR.

Subscribed & sworn to before me this 3rd day of Nov., A. D. 1870.
W. F. CHADWICK,
Notary Public.

9 On the 9th day of November, A. D. 1870, the defendants filed herein their demurrer, which is in words and figures following, to wit:

TERRITORY OF MONTANA,
County of Meagher, ss:

In the district court, 3rd judicial district, in and for the county and Territory aforesaid.

JOHN GALLAGHER ET AL., PLAINTIFFS,
vs.
WEST BASEY ET AL., DEFENDANTS.

Now comes the defendants in the above-entitled cause, by E. W. Toole, their attorney, and demur to the amended complaint of said plaintiffs, and for cause show unto the court the following, to wit:

1st. Said complaint shows that the cause of action alleged therein cannot be maintained, for the reason that the claim of plaintiffs is barred by the statute of limitations.

2nd. Said complaint does not state facts sufficient to constitute a cause of action.

E. W. TOOLE,
Def'ts' Attorney.

On the 29th day of November, A. D. 1870, the defendants filed herein their answer, which is in words and figures following, to wit:

In the third judicial district court, Meagher County, Montana Territory.

JOHN GALLAGHER, JAMES HORNBUCKLE, AND Samuel Marshall, plaintiffs,
vs.
W. BASEY, JAMES MCCABE, J. V. STAFFORD, O. C. Warner, W. Warner, L. Clem, and I. Clem, defendants.

Now comes the defendants in the above-entitled cause, by E. W. & J. K. Toole and J. A. Johnson, their attorneys, and for answer to the amended complaint on file in this case, admit that plaintiffs have ranches on the Missouri River bottom, but deny that they have cultivated them ever since the year 1866; and they deny that plaintiffs have at any time since they claim to have taken up said ranches cultivated the same with the waters of Avalanche Creek or Gulch. They deny that at the time plaintiffs ranches were taken up the waters flowing in Avalanche Creek or Gulch were unappropriated, and they deny that said waters were subject to appropriation at that time; they deny that in the year 1866 these plaintiffs and their predecessors located and commenced the construction of a ditch to convey the waters of Avalanche Creek or Gulch on to their said ranches; deny that these plaintiffs and their predecessors in interest in the spring of the year A. D. 1867, or at any other time, finished a ditch, and made any appropriation of the waters of Avalanche Creek or Gulch; they deny that plaintiffs and their predecessors in the spring of the year, A. D. 1867, or at any other time, appropriated five hundred inches of the waters of Avalanche Creek or Gulch, according to miners' measurement, nor any other number of inches; these de-
11 fendants deny that plaintiffs ever dug and completed a ditch which tapped Avalanche Creek or Gulch capable of carrying five hundred inches of water, nor any other number of inches; they deny that five hundred inches of water was or is necessary for the successful cultivation of plaintiffs' ranches; they deny that the plaintiffs and their predecessors used the waters of the said Avalanche Creek or Gulch for the purpose of irrigating their ranches from the spring of the year, A. D. 1867, up to the day of , A. D. 1867; they deny that said plaintiffs, by the use of the said waters, were enabled to and did raise large and valuable crops of grain, hay, and vegitables on their ranches. These defendants deny that on the day of , A. D. 1867, and on the day of , A. D. 1870, and on days intermediate said dates, or upon any other days and times, they made any diversion of the waters of said Avalanche Gulch or Creek, in violation of any of the rights of these plaintiffs or their predecessors; deny that plaintiffs have sustained great and irreparable damage and injury. They deny that plaintiffs' ranches have been rendered valueless; and they deny that plaintiffs have been prevented from cultivating their said ranches by reason of any wrongful act done by these defendants. Having answered, these defendants ask judgment for their costs.

E. W. TOOLE,
J. A. JOHNSON,
Att'ys for Defendants.

12 TERRITORY OF MONTANA,
County of Meagher:

J. V. Stafford, one of the defendants in the foregoing cause, and agent for his co-defendants, makes oath and says, that he has heard the foregoing answer read and knows the contents thereof; and that he has reason to believe, and does believe, that the matters as stated therein are true.

J. V. STAFFORD.

Subscribed & sworn to before me this 28th day of November, A. D. 1870.

T. J. DAWES, *Clerk.*

This cause came regularly on for trial before a jury, duly empanneled and sworn according to law, and after the evidence was adduced, instructions of court, and argument of counsel, the jury retired in charge of a sworn officer to consider of their verdict and special findings. Due deliberation being had, the said jury returned into court, and being called, answered each to his name, and presented their verdict and special findings, which are in words and figures following, to wit:

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

The jury are instructed by the court to answer the following questions:

13 1st. When did the predecessors of the plaintiffs first appropriate the waters of Avalanche Gulch?

Answer. Previous to September or October of 1866.

J. P. HILLIS, *Foreman.*

2nd. How many inches did they at that time appropriate?

Ans. About 35 inches.

J. P. HILLIS, *Foreman.*

3rd. Did White and Torvais, and, if so, when, give the plaintiffs and their predecessors the right to connect with their ditch, and extend and enlarge the same so as to carry sufficient water from Avalanche Gulch to irrigate their ranches; and, if so, when did they confer such right?

Ans. They did. In September or October of 1866.

J. P. HILLIS, *Foreman.*

4th. Did the plaintiffs and their predecessors extend and enlarge the White & Torvais ditch in pursuance of license from them?

Ans. They did.

5. If you answer that they did, when did they commence such extension and enlargement?

Ans. In September or October, 1866.

J. P. HILLIS, *Foreman.*

6. How much did they enlarge it?

Ans. About as large again.

J. P. HILLIS, *Foreman.*

14 7. What was the capacity of the ditch after the enlargement?

Ans. About 250 inches.

J. P. HILLIS, *Foreman.*

8. Who made the first appropriation of any of the waters of Avalanche Gulch?
Ans. Messrs. White & Torvais.

J. P. HILLIS, *Foreman.*

9. Did such first appropriators sell their water-right and water-ditch to defendants, or any of them; and, if so, when?
Ans. They did; sell to J. V. Stafford, in the spring of 1867.

J. P. HILLIS, *Foreman.*

10. Who comprises the defendants' mining-ditch company?
Ans. J. V. Stafford, O. C. Warner, W. Warner, S. Clem, I. Clem.

J. P. HILLIS, *Foreman.*

11. How many inches of water reached the head of defendants' mining-ditch from the time they turned the water into the same to the commencement of this action?
Ans. About 160 inches.

J. P. HILLIS, *Foreman.*

12. What number of inches of water must necessarily have the head of defendants' mining-ditch in order to deliver a sufficient quantity at the head of plaintiffs' ditch to be useful or beneficial to them?
Ans. About 160 inches.

J. P. HILLIS, *Foreman.*

13. When did the defendant Basey divert the waters of said gulch?
Ans. In the spring of 1867.

J. P. HILLIS,
Foreman.

14. Was there any ~~priority~~ privity of interest between Basey and the other defendants?
Ans. There was not.

J. P. HILLIS,
Foreman.

15. Did said Basey divert said waters under any agreement with plaintiffs, or by their consent, and what was such agreement?
Ans. They did, by paying plaintiffs for their crops for the year 1869.

J. P. HILLIS,
Foreman.

16. Have defendants, or either of them, diverted or threatened to divert the waters of the gulch, prior to the commencement of this action, previously appropriated by plaintiffs, to the injury of plaintiffs; and, if so, which of them have so done?
Ans. There has been, by Mr. Basey.

J. P. HILLIS,
Foreman.

17. Up to the time of the commencement of this action did defendants J. V. Stafford, I. Clem, O. C. Warner, W. C. Warner, or he, or either of them, or any one acting under them, divert any water to which plaintiffs, and which could have been used by plaintiffs, or either of them, on their ranche or ranches?
Ans. They did not.

J. P. HILLIS,
Foreman.

16 On the 6th day of May, A. D. 1871, the defendants filed herein their motion for judgment, which is in words and figures following, to wit:

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

Now comes the defendant W. Basey, by E. W. Toole and J. A. Johnson, his attorneys, and move the court to dismiss the bill in this case, and to render judgment in his favor for costs of suit, and for such further judgment and order in the premises as may be right and proper under the special findings of the jury rendered herein, and the pleadings in the cause.

E. W. TOOLE &
J. A. JOHNSON,
Attorneys for Defendants.

On the 26th day of May, A. D. 1871, the defendants filed herein the motion for judgment, which is in words and figures, to wit:

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

Now comes J. V. Stafford, I. Clem, L. Clem, O. C. Warner, and W. O. Warner, a portion of the defendants herein, by E. W. Toole and J. A. Johnson, their attorneys, and move the court to dismiss the bill in this case, and to render judgment in their favor for costs of suit, and
17 for such further judgment and order in the premises as may be right and proper under the special finding of the jury rendered herein, and the pleadings in the cause.

E. W. TOOLE &
J. A. JOHNSON,
Att'ys for Defendants.

On the 26th day of May, A. D. 1871, the plaintiffs filed herein their motion for judgment, which is in the words and figures following, to wit:

In 3rd judicial district court, Meagher County, Montana Territory.

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

And now come the plaintiffs, by Chumasero & Chadwick, Orr & Shober, and move the court for judgment and decree against the defendants, and in favor of the plaintiffs.

CHUMASERO & CHADWICK,
ORR & SHOBER,
Plaintiffs' Attorneys.

MAY 26, 1871.

On the 11th day of August, A. D. 1871, this cause came on to be heard upon plaintiffs' motion for judgment and decree, whereupon the court signs a judgment and decree, and the same is filed and entered of record, which judgment and decree is in words and figures following, to wit:

18 In the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis and Clarke, July term, A. D. 1871, D. S. Wade, judge.

JOHN GALLAGHER, JAMES HORNBUCKLE, AND Samuel Marshall, plaintiffs,
against
W. BASEY, JAMES MCCABE, J. V. STAFFORD, W. Warner, O. C. Warner, S. Clem, and I. Clem, defendants.

This cause having been commenced and brought on for a hearing in the district court of the third judicial district of the Territory of Montana, within and for the county of Meagher, (the same being the county in which the subject-matter of the action is situate,) at the May term of said court, holden in said county in the year of our Lord, 1871, upon the pleadings and proceedings therein; and the parties to this action, both plaintiffs and defendants, then and there having appeared by their counsel, and the issues of fact having then and there been joined, and submitted to a jury, and all of the evidence in the cause, both on behalf of the plaintiffs and the defendants, having been fully heard by the jury as well as this court, and the jury having brought in their findings upon the questions of fact so submitted to them, which findings
19 are filed with the other proceedings in this cause, and the evidence in this action having been closed, upon agreement of all the parties to this action by a stipulation in writing, which is duly filed in this court, the venue of this action was by the order of this court changed from the said county of Meagher to the county of Lewis and Clarke aforesaid; and pursuant to said order of said court all of the pleadings, records, findings, and other proceedings relating to said action having been duly transmitted to and filed in the above-entitled court for final hearing of said cause; and this cause coming on the day of July, A. D. 1871, to be heard and decided by this court upon the pleadings, evidence, and proceedings therein, including the findings of said jury, filed as aforesaid, and Messrs. Chumasero & Chadwick, and Orr & Shober and Lowery appearing as counsel for the plaintiffs, and Toole & Toole and J. A. Johnson appearing as counsel for defendants, and the pleadings in the case being opened upon debate of the matter, and hearing what was alleged by the counsel on both sides, and upon the pleadings, evidence, and proceedings in the case, including said findings of said jury, filed as aforesaid; and it appearing from the premises to the satisfaction of this court that as against the plaintiffs in this action the right of the defendant J. V. Stafford to the use and
20 enjoyment of such an amount of the waters of Avalanche Creek mentioned in the plaintiffs' complaint, to be taken from said creek at the head of defendants' ditch, as would amount to thirty-five inches at the head of the plaintiffs' ditch is clearly and fully established; and that as against the defendants in this action, saving the above amount of the waters of said gulch, the plaintiffs in this action are clearly entitled to the free use, occupation, and enjoyment of two hundred and fifteen (215) inches (miners' measure) of the waters of said Avalanche Creek, to be taken therefrom at the point where their said ditch taps said Avalanche Creek as described in said complaint; and that the said plaintiffs have an indisputable right as against the defendants to have said amount of the waters of said gulch at all times to flow down said creek to the head of their said ditch, and that the defendants previous

to the commencement of this action had diverted said waters from plaintiffs' ditch. And it further appearing to this court that the plaintiffs are entitled to their costs in this action expended:

Therefore it is ordered, adjudged, and decreed that the defendants, W. Basey, Jones McCabe, J. V. Stafford, O. C. Warner, W. Warner, S. Clem, and J. Clem, their grantors, agents, servants, employés,
21 and all persons whomsoever claiming or acting through or under them, or either of them, be and are hereby perpetually enjoined from in any manner whatsoever diverting or interfering with or interrupting the natural flow of the waters of Avalanche Creek or Gulch, situate in the county of Meagher, in the Territory of Montana, in such manner as to prevent the full volume and amount of two hundred and fifteen (215) inches (miners' measure) of said Avalanche Creek from flowing at all times down the natural channel of said gulch or creek to and unto the head of the ditch of plaintiffs, John Gallagher, James Hornbuckle, and Samuel Marshall, described in the complaint of plaintiffs, and which said ditch taps the said Avalanche Creek below the ditch of said defendants, and conveys the waters of said Avalanche Creek to, in, and upon the ranches and farms of the plaintiffs, located upon the Missouri River Valley, in said county of Meager. It is expressly provided, however, that the defendant J. V. Stafford may at all times take of the waters of said Avalanche Creek thirty-five (35) inches at the point on said Avalanche Creek where the plaintiffs' ditch taps the same, or at any point on said creek above where plaintiffs' ditch taps the same; it being hereby determined, adjudged, and decreed that when there is a sufficient amount of water flowing in
22 said Avalanche Gulch to convey to the point where plaintiffs' ditch taps the same to make two hundred and fifty inches, that plaintiffs shall be entitled to two hundred and fifteen inches of said water as against all of said defendants, and whenever there is a volume of water flowing in said stream to the point where plaintiffs' ditch taps the same less in amount than two hundred and fifty inches, and in excess of thirty-five inches, then the plaintiffs as against said defendants shall be entitled to all of such volume in excess of said thirty-five (35) inches.

And it is further adjudged that the plaintiffs aforesaid do have and recover from the defendants their costs in this action taxed at dollars .

The foregoing decree is based upon the special findings of the jury in this case and the pleadings therein.

D. S. WADE,
Judge.

To the rendition of said judgment and decree the defendants by their attorneys then and there excepted.

On the 22nd day of November, A. D. 1871, the defendants filed herein their notice of appeal, which is in words and figures, to wit:

23 In 3rd district court for Lewis and Clarke County, Montana Territory.

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

You will please take notice that the defendants in the above-entitled cause hereby appeal to the supreme court of Montana Territory from

the judgment and decree made and entered in said cause on the 11th day of August, 1871, in favor of plaintiffs and against the defendants, and from the whole thereof.

Yours, &c.,

TOOLE & TOOLE,
Counsel for Appellants.

To the clerk of said court, and Messrs. Chumasero and Chadwick, of counsel for respondents.

Dated November 22, 1871.

HELENA, M. T., *Nov. 22d*, 1871.

Received a copy of the within notice.

CHUMASERO & CHADWICK,
Att'ys for Plaintiffs.

On the 25th day of November, A. D. 1871, the defendants filed herein their undertaking on appeal, which is in words and figures following, to wit:

24 In 3rd dist. court, Lewis & Clarke County, Territory of Montana.

JOHN GALLAGHER ET AL.
vs.
W. BASEY ET AL.

Whereas the defendants in the above-entitled cause are about to appeal to the supreme court of the Territory of Montana from a judgment and decree entered against them in said district court in favor of the plaintiffs in the said action on the day of , 1871, for and from the whole and every part thereof: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, David Hagadorn, of Lewis and Clarke County, and Leopold Aurback, of the same place, do hereby jointly and severally undertake and promise on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 22nd day of Nov., 1871.

D. HAGADORN. [SEAL.]
L. AUERBACH. [SEAL.]

TERRITORY OF MONTANA,
Lewis and Clarke County, ss:

David Hagadorn and Leopold Auerbach, whose names are subscribed to the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says he is a resident house-
25 holder in said Territory, and is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities exclusive of property exempt from execution.

D. HAGADORN,
L. AUERBACH.

Subscribed and sworn to before me this 23rd day of Nov., 1871.

HENRY ADDAMS,
Notary Public.

I, H. P. Wade, clerk of the 3rd judicial district court of the Territory of Montana, do hereby certify that the foregoing forty pages, numbered from one to forty inclusive, contain a true and correct transcript of certain proceedings, records, and pleadings had, made, and filed in said district court in the case of John Gallagher et al. against W. Basey et al.

Witness my hand and the seal of said court this 26th day of December, A. D. 1871.

[SEAL DIST. COURT.]

H. P. WADE, *Clerk*,
By ALEX. H. BEATTIE,
Deputy Clerk.

26 In the supreme court of the Territory of Montana, January term thereof, A. D. 1872.

JOHN GALLAGHER, JAMES HORNBUCKLE, SAMUEL MARSHALL, *vs.* W. BASEY, JAMES MCCABE, J. V. STAFFORD, O. C. Warner, W. Warner, S. Clem, and I. Clem. } Appeal from 3rd judicial district, Montana Territory.

Be it remembered that on the 2nd day of January, A. D. 1872, the transcript of the record of the proceedings had and done in the above-entitled cause in the third judicial district court of said Territory was duly filed and entered in the office of the clerk of said supreme court.

And afterwards, to wit, on the 4th day of January, A. D. 1872, that being one of the days of the January term, A. D. 1872, of said supreme court, the said cause came regularly on for hearing on the appeal entered herein, and the errors assigned on the said appeal were fully argued by counsel for the respective parties, and submitted to the court.

And afterwards, to wit, on the 8th day of January, A. D. 1872, the said cause coming on in said court for decision and judgment on the appeal entered therein, and the errors assigned on the said
27 appeal having been fully argued by counsel, and the court being fully advised as to the law in the case:

On consideration whereof it is ordered, considered, and adjudged here by the court, that the judgment and decree entered herein by the court below be affirmed with costs, which is entered of record accordingly.

And thereupon, on the same day, the court filed herein its opinion in writing, of which in words and figures the following is a copy, to wit:

In the supreme court.

JOHN GALLAGHER ET AL., PLAINTIFFS, *vs.* W. BASEY ET AL., DEFENDANTS. } Appeal from Meagher County, third district.

Opinion by Wade, Chief Justice.

This was an application for an injunction to restrain and perpetually enjoin the defendants from the use of the waters of a certain stream known as Avalanche, situate in the Missouri Valley in Meagher County, Montana. The complaint is a bill in chancery, and substantially sets forth: That in the year 1866 the plaintiffs and their predecessors in interest took up certain ranches on the public domain for the purpose of settlement and cultivation in the
28 county of Meagher, situate on the Missouri River bottom, a short distance below a stream known as Avalanche; and that

water for irrigating purposes is necessary for the successful cultivation of said ranches. And it is further alleged that from the year aforesaid to the present time the plaintiffs and their predecessors in interest and possession have occupied, cultivated, and now occupy and cultivate said ranches; that at the time of the location of said ranches by the plaintiffs, the water flowing in Avalanche Creek was unappropriated by any person, and was subject to appropriation, and that the plaintiffs at that time, by means of a certain ditch constructed by them and their predecessors, appropriated five hundred inches, miners' measure, of the waters of said creek for the purpose of irrigating their said ranches; and that that amount of water is necessary to successfully cultivate the same, and that plaintiffs' ditch taps said creek a short distance above where the same empties into the Missouri River; that continuously since the construction of said ditch, up to the time of the wrongful acts of the defendants herein complained of, the plaintiffs and their predecessors in interest have successfully cultivated their said ranches by means of said ditch, and the waters thereby appropriated. The complaint further charges that long after the appropriation of said waters by the plaintiffs, the defendants, well knowing the rights of the plaintiffs in the premises,
29 and well knowing that said plaintiffs, by virtue of prior appropriation, had become entitled to the use of said waters, and in violation of their rights proceeded to erect dams across said creek, above the head of plaintiffs' ditch, and to construct ditches and turn out and divert the waters of said stream, thereby wholly depriving the plaintiffs of the use and enjoyment of the same, to their great and irreparable damage and injury, and thereby rendering the ranches of the plaintiffs worthless for the purposes of cultivation. The prayer of the complaint is for a perpetual injunction to restrain and enjoin the defendants from the use of the waters of said stream, to the injury or damage of the plaintiffs. The answer of the defendants admits that the plaintiffs have ranches on the Missouri River bottom as averred in the complaint, but specifically denies each and every other material allegation of the complaint, and charges that plaintiffs have no rights to the waters of said stream as against the defendants, and that the acts of the defendants have in no manner injured or damaged the plaintiffs or their ranches. The foregoing statement of the case is sufficient for our present purpose, and it will be seen that the cause is a bill in chancery wherein equitable relief is demanded, and the form of proceedings in chancery practice, as distinguished from actions at law, is properly applicable to the case, and the present inquiry involves the question whether this case was tried as an action at law or as a suit in equity. By the record it appears that the trial took place at the May term, 1871, of the district court of
30 Meagher County, and that upon the trial certain questions were submitted by the court to a jury to answer, which they did, and the questions and answers were filed with the papers in the case. Afterwards at the July term, 1871, of the district court of Lewis and Clarke County, the cause came on to be heard upon plaintiffs' motion for judgment and decree against the defendants and in favor of the plaintiffs, the cause having been removed to that court by agreement of the parties for that purpose. This motion having been fully argued by counsel for both plaintiffs and defendants, and the cause finally submitted to the court for judgment and decree, upon the pleadings, evidence, and proceedings in the case, the court find: That as against the plaintiffs the defendant J. V. Stafford is entitled to the right, to the use and enjoyment of such an amount of the waters of Avalanche Creek mentioned in the plaintiffs' complaint, to be taken from said creek at the head of

defendants' ditch, as would amount to thirty-five inches at the head of plaintiffs' ditch; and that such right is clearly established, and that as against the defendants in this action, saving the above amount of the waters of said creek, the plaintiffs in this action are clearly entitled to the full and free use, occupation, and enjoyment of two hundred and fifteen inches, miners' measure, of the waters of said creek, to be taken therefrom at the point where their said ditch taps said creek as described in said complaint, and that said plaintiffs have an indisputable
31 right as against the defendants to have said amount of the waters of said creek at all times to flow down the same to the head of said ditch, and that defendants, previous to the commencement of this action, had diverted said waters from said plaintiffs' ditch. It will be observed that the foregoing findings of the court are based upon the pleadings, evidence, and proceedings in the case, as fully appears from the decree.

These findings and this decree emanate entirely from the court, and speak the convictions of the court upon the evidence in the case, uncontrolled by any other consideration. A comparison of the findings of the court as contained in the decree with the answers to the questions submitted to the jury will conclusively disclose the fact that the court disregarded certain findings of the jury, and that the court alone is responsible for the decree and the findings thereof. We are therefore of opinion that the objection of defendants that the case was tried as an action at law, when it should have been tried as a suit in equity, is not well taken. Now, for the purpose of settling, so far as is possible, the vexed question as to the right, under our code of civil procedure, of blending in one proceeding actions at law and suits in equity, and as particularly applicable to the case under consideration, we say: That under and by virtue of the act organizing this Territory the supreme and district courts are clothed with chancery as well as common-law jurisdiction, and in the exercise of the authority thus conferred
32 the forms of proceedings must conform to the well known and recognized distinctions pertaining to said jurisdictions as limited by law; that is to say, causes in equity wherein equitable relief is demanded, or where an equitable defense is made to a claim at law, must be tried as in a court of chancery, and the decree must proceed from the judge sitting as a chancellor, and it would be error in the class of cases described to try them as at law to a jury. That it is competent to limit and control by statute the forms of proceedings in actions at law, and suits in equity, but that no statute and no law of our legislature can in any manner destroy or blend together these seperate and distinct jurisdictions; that our organic act recognizes a distinction between suits in equity and actions at law, and that the substance of this distinction must be preserved, although the forms of proceedings may be prescribed and limited by law, and that the civil code may be followed in equity causes, so far as the same is applicable, but that care must be taken to preserve the distinguishing features of a suit in chancery. The organic act provides that "the supreme and district courts shall possess chancery as well as common-law jurisdiction." It further provides, "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law." The meaning of the phrase "as limited
33 by law" is that the mode and manner of proceedings may be controlled and governed by law, but this does not at all impair the declaration that the courts shall possess chancery as well as common-law jurisdiction, and these seperate and distinct jurisdictions being thus

conferred, they cannot by any action of the legislature be blended together, but must be kept and preserved inviolate. The suit under consideration was a bill in chancery wherein the equitable jurisdiction of the court was properly invoked, and the record herein clearly shows that it was tried by the court sitting as a chancellor, and that the decree emanates from the chancellor, and that the questions submitted to the jury were to aid the conscience of the court, but not to control it, as fully appears from the fact that while the jury answered that as against the plaintiffs the defendants had not diverted or appropriated the waters of the stream to the injury or damage of the plaintiffs, the court found precisely to the contrary, that the defendants had diverted and appropriated said waters to the damage and injury of the plaintiffs, and base a decree for a perpetual injunction upon the fact.

The judgment and decree of the court below is affirmed.

D. S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
JOHN L. MURPHY,
Asso. Justice.

Filed January 8th, 1872.

I. R. ALDEN, *Clerk.*

34 And afterwards, to wit, on the 9th day of January, A. D. 1872, the said defendants and appellants filed herein their motion for a rehearing in said cause, and an undertaking for a stay of execution for the collection of costs in said action, of which undertaking, in words and figures, the following is a copy, to wit:

JOHN GALLAGAER ET AL., PLAINTIFFS & RESPONDENTS,
vs.
W. BASEY ET AL., DEFENDANTS & APPELLANTS.

Whereas the defendants and appellants have filed their motion for a rehearing in the above-entitled cause; and whereas said motion is now pending in the supreme court of the Territory of Montana; and whereas said appellants also ask a stay of execution for the collection of the costs in this action; and whereas said stay has been granted upon condition that said appellants execute an undertaking to said respondents, conditioned to pay said respondents any damage they may sustain by reason of such stay of execution, not exceeding the sum of six hundred dollars:

Now, therefore, we, the undersigned, in consideration of the premises and the stay of said execution for the collection of costs in said action, acknowledge ourselves jointly and severally bound unto said respondents in the sum aforesaid; that said appellants will pay said respondents any and all damages said respondents may sustain by reason of the stay of said execution.

35 Signed, sealed, and dated this 9th day of January, A. D. 1872.

ISRAEL CLEM. [SEAL.]
ROBERT FISHER. [SEAL.]
COLEMAN PUETT. [SEAL.]

I hereby approve the foregoing bond and the sureties thereto.

I. R. ALDEN, *Clerk.*

Filed January 9th, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, to wit, on 10th day of January, A. D. 1872, the court made and signed in writing an order staying the execution for the collection of costs in said action, of which order, in words and figures, the following is a copy, to wit:

In the supreme court.

JOHN GALLAGHER ET AL., PLAINTIFFS & RESPONDENTS,
vs.
WES. BASEY ET AL., DEFENDANTS & APPELLANTS.

Whereas the appellants in the above-entitled cause have filed their motion for a rehearing therein, and an undertaking for a stay of execution for the collection of the costs in said action, as required by this court:

It is therefore ordered that the execution therein for the collection of the costs in this action, and the collection of said costs, be, and the same are hereby, stayed until the further order of this court.

Dated this 10th day of January, A. D. 1872.

D. S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
JOHN L. MURPHY,
Asso. Justice.

Filed Jan'y 10, 1872.

I. R. ALDEN, *Clerk.*

36 And afterwards, to wit, on the 17th day of August, A. D. 1872, that being one of the days of the August term, A. D. 1872, of said supreme court, the said appellants, by their attorney of record, E. W. Toole, esq., filed herein their points in writing on said motion for rehearing, of which in words and figures the following is a copy, to wit:

In supreme court.

JOHN GALLAGHER ET AL.
vs.
WEST BASEY ET AL.

Points suggested by attorneys for appellants on motion for a rehearing

1st. The decree signed in the case shows the fact that it was based upon the pleadings and findings of the jury. Defendants' attorneys proposed to present the evidence upon which those findings were based, which they claim would fully support such findings, and the court assured them that said decree was based exclusively upon the findings of the jury. (Hence see entry at bottom of decree.)

2nd. The learned judge below forming a part of this court did not likely participate in the decision rendered at the last term, hence we find in that opinion one position alone to support it, and that is this, that the court found other facts than those embraced in the findings of the jury, or disapproved of some of them.

3rd. If this case stands, as it properly should, under the rulings of the court below, and the entry made at the foot of the decree upon the find-

37 ings of the jury, no right of plaintiffs, if they had any, was ever interfered with by defendants.

4th. This was the first case tried here (of the kind) by the learned judge below, and it was tried by a jury in the ordinary way without reference to equity, jurisdiction, or practice. It should not prove an exception. In truth, the court below, against the protestation of defendants' attorneys, proceeded upon the basis that the bare construction of a ditch tapping the stream above the head of plaintiffs' ditch was per se an interferance with their right.

5. As explanatory of what appears to be a conflict in the findings of the jury, suppose (which was the fact, and in evidence) that less than 160 inches of water at the head of defendants' ditch in the above would not reach plaintiffs' ditch, and that at no time they used any water when there was a greater amount, no damage or injury certainly could be done; flush streams at their source are often dry in the valleys, and especially the one in controversy when it reached what is called the ranches of plaintiffs.

6th. If this hon. court assumes, as did the court below, that this decree is based upon the findings of the jury, such findings show that not an inch of water to which plaintiffs were entitled was ever diverted from defendants, or threatened to be so diverted, except by Basey, and that he diverted it by and under a contract.

E. W. TOOLE,
Of Counsel for Defendants.
STAFFORD, WARNER & CO.

Filed Aug. 17th, 1872.

I. R. ALDEN, *Clerk.*

38 And afterwards, on the same day, the said cause coming on to be heard on defendants' motion for a rehearing, the same was overruled by the court, and the order granting a stay of execution for the collection of costs in said action was vacated.

And afterwards, to wit, on the 20th day of August, A. D. 1872, the said defendants moved the court for an order granting an appeal to the Supreme Court of the United States from the said judgment and decree rendered and entered herein, which was duly made, and the appeal asked was granted.

And afterwards, to wit, on the 28th day of August, A. D. 1872, the said defendants filed herein their undertaking on appeal, of which in words and figures the following is a copy, to wit:

Undertaking on appeal.

Supreme Court of the United States.

JOHN GALLAGHER AND JAMES HORNBUCKLE, respondents,
vs.
WEST BASEY, J. V. STAFFORD, O. C. WARNER, W. Warner, Israel Clem, and S. Clem, appellants.

39 Know all men by these presents that we, West Basey, J. V. Stafford, O. C. Warner, W. A. Warner, Israel Clem, and S. Clem as principals, and R. H. Canine, H. J. McDonald, and J. P. Woolman as

sureties, are held and firmly bound unto John Gallagher and James Hornbuckle in the sum of twenty-five hundred dollars, to be paid to the said John Gallagher and James Hornbuckle, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 27th day of August, 1872.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States of America to reverse a judgment and decree rendered in the above-entitled cause by the supreme court of the Territory of Montana:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their said appeal to effect, and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

J. V. STAFFORD. [SEAL.]
O. C. WARNER. [SEAL.]
W. O. WARNER. [SEAL.]
I. CLEM. [SEAL.]
S. CLEM. [SEAL.]
W. BASEY. [SEAL.]
40 R. H. CANINE. [SEAL.]
H. J. McDONNELL. [SEAL.]
J. P. WOOLMAN. [SEAL.]

Sealed & delivered in presence of—

TERRITORY OF MONTANA,
County of Meagher:

R. H. Canine, H. J. McDonald, and J. P. Woolman make oath and say, each for himself, that he is worth the amount mentioned in the within bond as the penalty thereof over and above his debts and liabilities and property exempt from execution, and that he is a resident of said Territory.

R. H. CANINE.
H. J. McDONELL.
J. P. WOOLMAN.

Subscribed & sworn to before me this 27th day of August, A. D. 1872.

E. W. CARPENTER,
United States Commissioner, Third District Montana T'y.

Sufficiency of penalty and security of the within bond approved, appeal allowed, and supersedeas ordered August 27th, 1872.

D. S. WADE,
Chief Justice, M. T.
JOHN L. MURPHY,
Asso. Justice, M. T.

Filed August 28th, 1872.

I. R. ALDEN, *Clerk.*

And on the same day, the said appellants, by their attorney, E. W. Toole, filed their affidavit of value herein, of which in words and
41 figures the following is a copy, to wit:

In supreme court.

TERRITORY of MONTANA,
County of Lewis & Clarke, ss:

JOHN GALLAGHER ET AL., RESPONDENTS,
vs.
WEST BASEY ET AL., APPELLANTS.

E. W. Toole makes oath and says that he is attorney for appellants; that he knows the property in controversy, and embraced in the decree and injunction herein; and that the same is of the actual value of at least three thousand dollars.

E. W. TOOLE.

Subscribed and sworn to before me this 27th day of August, 1872.

E. W. CARPENTER,
United States Court Commissioner,
3rd district, Montana Territory.

Filed August 28th, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, on the same day, the said appellants, by their attorney, E. W. Toole, filed herein their appeal in writing, the original being hereunto attached and made a part of this record, and is in words and figures following, to wit:

42 JOHN GALLAGHER, JAMES HORNbuckle, & Sam'l Marshall,
vs.
WM. BASSEY, JAS. McCABE, & J. V. STAFford, W. Warner, O. C. Warner, S. Clem, & I. Clem.

To the hon. the Supreme Court of the United States:

The appeal of William Basey, James McCabe, J. V. Stafford, W. Warner, O. C. Warner, S. Clem, & I. Clem, the above-named defendants and appellants, respectfully showeth: That upon the 22d day of Oct., '70, the above-named complainants filed their bill in the district court of the third judicial district of Montana Territory, in and for Meagher County, against the above-named defendants and appellants, and that afterwards, to wit, on the 26th day of May, 1871, the said cause was tried in said county, asking for an injunction to restrain the use of water as in said complaint stated, and by stipulation of counsel it was charged to Lewis & Clarke County, in said district.

42½ That on the 20th day of August, 1872, (or thereabouts,) a final decree was made and pronounced in the cause wherein it was in substance adjudged and decreed that the decree in the lower court where said cause originated be affirmed, and that the same was duly done. And that then and there a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the decree originally given in this case and affirmed, as above stated, be, and was thereby, affirmed and made the decree of said supreme court.

Wherefore these appellants appeals from the whole of said decree of said supreme court of Montana Territory, and respectfully pray that the decree of the said supreme court of said Territory, and the bill, answer, pleadings, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that said Supreme

Court will proceed to hear the said cause anew, and that the said
42¾ decree of the said supreme court of Montana Territory, and every part thereof, may be reversed, and a decree made reversing said decree of said supreme court, with costs, or such other decree as to said Supreme Court shall seem just.

E. W. & J. K. TOOLE, &
I. H. SHOBER,
For Def'ts & Appellants.

Dated this 27*nd* day of August, A. D. 1872.

TERRITORY OF MONTANA,
County of Lewis & Clarke:

E. W. Toole makes oath and says that service of writ of error, citation & bond herein were duly made by him on the 27th day of August, A. D. 1872, upon the att'ys of the appellees & respondents.

E. W. TOOLE.

Subscribed and sworn to before me this 18th d. of *of* Ja'y, 1873.

N. HILGER,
Probate Judge.

(Indorsed:) Appeal. John Gallagher et al. vs. W. Basey et al. Appeal filed August 28, '72.

I. R. ALDEN,
Clerk.

43 And on the same day the said attorney for defendants filed herein their citation, the original being hereunto attached and made part of this record, and is in words and figures following, to wit:

44 By the Hon. D. L. Wade, chief justice of the supreme court of the Territory of Montana, to John Gallagher, James Hornbuckle, & Samuel Marshall, and their solicitors of record:

Whereas William Bassey, James McCabe, J. V. Stafford, O. C. Warner, W. Warner, S. Clem, & J. Clem have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Montana, made in favor of you, the said John Gallagher, James Hornbuckle, & Samuel Marshall, and have filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington on the first Monday of Decem-
45 ber next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand this 27*nd* day of August, at Helena City, M. T., in the year of our Lord 1872.

D. L. WADE,
Chief Justice of the Territory of Montana.

(Indorsed:) Cit*i*tation. John Gallagher vs. W'm Bassey et al. Filed Aug. 28, 1872. I. R. Alden, clerk.

46 In the supreme court of the Territory of Montana.

JOHN GALLAGHER ET AL., RESPONDENTS,
vs.
W. BASEY ET AL., APPELLANTS.

I, I. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true, and correct transcript of the proceedings had and done in the above-entitled cause, as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court at Virginia City, in said Territory, on this 27th day of November, anno Domini 1872.

[SEAL.] I. R. ALDEN,
Clerk.

(Indorsement on cover:) No. 407. W. Basey, James McCabe, J. V. Stafford, W. Warner, O. C. Warner, S. Clem, and J. Clem, appellants, vs. John Gallagher, James Hornbuckle, & Samuel Marshall. Montana Terr'y sup. court. Filed 7th February, 1873.

IN THE

Supreme Court of the United States.

No. 126.—October Term, 1874.

WILLIAM BASEY and OTHERS, Respondents and Appellants,

vs.

JOHN GALLAGHER and OTHERS.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF OF COUNSEL FOR APPELLANTS.

Statement.

The defendants in error, in their amended complaint, filed in the district court on the 5th of November, 1870, alleged that in the year 1866 certain public lands in said territory, situate a short distance below a stream known as Avalanche, had been taken up for settlement and cultivation, and that the claimants, and those under whom they claimed, had possessed and cultivated the same from that time till this action was brought. That the water of said stream, to the extent of five hundred inches of miners' measurement, had been applied by them to the said land by means of a ditch, commenced in 1866 and completed in 1867, which ditch tapped said stream a short distance above its confluence with the Missouri river.

That that amount of water was necessary to the profitable cultivation of said land, and that by the use of it in irrigating the same the complainants had made large crops until the appellants, in 1867, and subsequently, diverted said water from said land, thereby rendering it nearly worthless. Wherefore the complainants pray for a decree enjoining the appellants from diverting said water, and for costs. To this complaint appellants demurred, and assigned for cause of demurrer (1) that the action was barred by the statute of limitations, and (2) that it did not state facts showing any cause of action.—(p. 4.) The record does not show any action by the court upon this demurrer. On the 28th of November, 1870, (p. 5,) an answer was filed by the appellants denying all the allegations of the complaint, save only the allegation that the appellees had possession of the land or ranches mentioned, and on the same day the case was tried, a jury was empaneled and directed to make special findings on certain points, (p. 6,) and in pursuance of their instructions they found (1st and 2d) that prior to Sept., 1866, complainants had appropriated about 35 inches of water. (4th, 5th, 6th, and 7th.) That afterwards the *capacity* of their ditch was doubled, and its *capacity* was then 250 inches. (3d and 9th.) That the first appropriators of the water were White and Torvais, who gave complainants the right to take sufficient water to irrigate their ranches, in the fall of 1866, and sold out all their right to appellants in the ensuing spring of 1867. (13th, 14th, and 15th.) Basey had no interest or privity with the other appellants, and diverted the water for his own use exclusively, under an agreement with the complainants. (16th and 17th.) And that neither of the other appellants had ever injured the complainants by diverting from their use any water they had previously appropriated or which could have been used by them.

The decree (p. 10) states that it "is based upon the special findings of the jury in this case, and the plead-

ings therein," and nevertheless finds that complainants are entitled to 215 inches, after Stafford had received 35 inches; that appellants had diverted from the complainants water to which they were entitled, and adjudges appellants to pay costs, and enjoins them from continuing to divert said water.

From this decree the appellants, on the 25th November, 1871, (p. 11,) appealed to the supreme court of the territory, which court, (p. 12,) on the 8th day of January, 1872, affirmed the decree of the district court, and from this decision appellants took an appeal to this court on the 28th of August, 1872.—(p. 17.)

Assignment of Errors.

The appellants allege that the supreme court of the territory erred in affirming the decree of the district court. First, because the complaint of the appellees does not show sufficient grounds for the relief prayed for and granted; second, because the decree is on its face contradictory—purporting to be based on the facts found by the jury, whilst directly overruling and disregarding the findings of the jury; third, because, by the laws of the territory, the findings of the jury are conclusive upon the court.

Argument.

I. The complaint and decree proceed altogether upon the assumption that the appellees acquired a vested right in the water in question by being the first appropriators of it.

The act of Congress on this subject is the 9th section of the act of July 26, 1866, 14th Stat., p. 253, which provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws,

and the decisions of courts, the possessors and owners of such vested rights shall be maintained in the same." By these terms, the right in question is made to depend upon the existence of three several conditions: *First*, "it must be recognized and acknowledged by the local customs of the territory;" *second*, by "the (local) laws;" and, *third*, "by the decisions of the courts." This is the ground taken by Chief Justice Wade himself in his opinion in the case Thorp vs. Freed, 1st Montana Reports, p. 664—the same volume which contains his decision in this case at p. 457. In that case he discusses the question at length whether either of these conditions existed in Montana; quotes the 4th section of the act of 1865, to be found in 1 Session Acts, p. 367, which provides "that in case the volume of water in said stream or river shall not be sufficient to supply the combined wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in just and equitable proportion, a certain amount of said water, upon certain alternate week days, to different locators, as they may in their judgment think best for the interest of all the parties concerned, and with due regard to the rights of all."

Upon p. 668 the opinion declares that, "looking at the whole statute, we say most unhesitatingly that the whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation. * * * If the section does not mean that there shall be an equal distribution among all the parties concerned in such water, without any regard whatever to the date of appropriation, then we are utterly unable to comprehend the language used."

On p. 669 he says: "It is not discovered that the decision of any court, either in this territory or in California, has pretended to establish the doctrine of prior appropriation, as has been sought to be applied to agricul-

tural lands;" and he is equally positive that no local custom exists establishing such a right. So that, instead of a concurrence of all three conditions—of local custom, local law, and local decision—which he insisted was necessary, he affirms that not one of them existed. Hence there was no pretence for asserting any right by the prior appropriation of water in the Territory of Montana. Indeed, it was not until the act of 1870 passed, the 5th section of which makes the date of appropriation determine the right that such a right was established. The case was not decided on this point, however, and the other judge who sat in this case, Mr. Justice Knowles, held different views from those above quoted from the opinion of the chief justice. He holds, pp. 655, 666, that it had been the custom of the inhabitants ever since the settlement of the territory, to divert the water of streams upon their possessions; and he construes the first section of the act of 1865 to recognize and sanction this custom; and he draws the conclusion, p. 357, that "he who is prior in time in availing himself of such a statute is prior in right." Mr. Justice Knowles had previously expressed these views in the case of Wolman, Ib., p. 170, but that question was not involved in the case, and the only point decided in it was against the legality of an award made by commissioners appointed under the 4th section of the act of 1865. The question here presented has, therefore, not been decided by the supreme court of the territory; and this court will have to choose between the reasoning of the chief justice and that of his associate.

II. The contradiction on the face of the decree is plain. Puporting to be based upon the findings of the jury, it confessedly overrules them. The supreme court says, in its opinion, (p. 14): "A comparison of the findings of the court, as contained in the decree, with the answers to the questions submitted to the jury, will conclusively disclose the fact that the court disregarded certain findings of

the jury," and yet the decree closes by declaring that it is "based upon the special findings of the jury."—(p. 10.) It will be observed that among the points suggested by the counsel for appellants (p. 16) for a rehearing, is the fact that this statement was put in the decree in answer to the proposition to embody the evidence in the record. It is not necessary that the court should have this explanation of the extraordinary contradictions in the decree itself to enable it to see that the mind of the court which rendered it was confused, and that it would be unjust to allow it to stand. In effect, this declaration of the court is that the evidence fully sustains the findings of the jury, and that it adopts them; but, taking them in connection with the pleadings, the decree must be for the appellees. No effect can be given to the language that "*the decree is based upon the findings*" which will come short of this. As they were the ultimate facts as found by the court as well as by the jury, it was not necessary to encumber the record with the evidence by which they were established. But it may be said, and with truth, that the facts stated in the preceding part of the decree as the facts found by the court itself are repugnant to such a construction of the language, and the conclusion at which the court arrives being in accordance with its own findings, and adverse to those of the jury, shows that the language with which the decree closes is without meaning, and should be disregarded. But this is inadmissible. If the findings of the decree were insufficent to support it, it could not stand.—(Sampson vs. Hunt, 1 Root, 207, 521; Burdoin vs. Shelton, 10 Yerg., 41; 1 Verm., 166; Brend vs. Brend, 1 Ver., 213; Benham vs. Newcomb, Ib., 214.) But it would be far more logical to allow such a decree to stand than one reciting totally inconsistent facts.

III. The decree overrules the findings of the jury. By the first section of the act to regulate proceedings in

civil cases, re-enacted in 1867, (Session Acts, p. 135,) but one form of action is allowed in Montana Territory, and all distinctions in actions are abolished. By section 155, p. 163, issues of fact are required to be tried by a jury in all cases, unless a jury is waived, or a reference is ordered, as provided for in the act. By section 165, p. 165, it is declared that the jury are the *exclusive* judges of all questions of fact. The question then is, is this a valid law? It has been argued that it is not, because the constitution recognizes the distinction between law and equity, one of which, it is argued, is that in equity the court is responsible for the findings, both of law and fact. Whereas, on the law side, the court accepts the facts from the jury. But the distinction between law and equity jurisdiction does consist in, and is not affected by, this, the usual difference in the practice of the courts exercising these respective jurisdictions; for although it has generally prevailed, the distinction between law and equity does not depend upon it. In North Carolina, where the distinction is as fully recognized as in England, the law requires just what the Montana statute requires—that all issues of facts should be decided by a jury in equity cases as well as in law cases, and if it does not appear on the record that the facts had been found by a jury, it is error for which the decree could be reversed.—(Taylor vs. Person, 2 Hawks, p. 298.) It is obvious, indeed, that the essential distinction between law and equity is not affected by making the findings of fact by the jury conclusive, instead of being merely advisory.

By the contrivance of feigned issues the jury has always been a part of the machinery used by chancery courts for the investigation of facts. The statutes of Montana, like those of North Carolina and other states, do but simplify the proceedings and give to the findings the effect in law which they have usually had in fact. No one contends that Congress could not make this the

practice of the federal courts, and this court held at the last term, in Hornbuckle vs. Tombs, 18 Wall., p. 656, "that the practice, pleadings, forms, and modes of proceeding in the territorial courts * * were intended to be left to the legislatures of the territorial assemblies."

MONTGOMERY BLAIR.

SUPREME COURT OF THE UNITED STATES.

No. ~~107~~. 126

W. BASEY, JAMES McCABE, J. V. STAFFORD, W. WARNER, O. C. WARNER, S. CLEM, AND J. CLEM, APPELLANTS.

vs.

JOHN GALLAGHER, JAMES HORNBUCKLE, AND SAMUEL MARSHAL, RESPONDENTS.

Appellants' Brief.

W. F. SANDERS, *Of Counsel.*

Helena Herald Print.

SUPREME COURT OF THE UNITED STATES.

No. 407.

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vs.

JOHN GALLAGHER, JAMES HORNBUCKLE, AND SAMUEL MARSHAL, RESPONDENTS.

Appellants' Brief.

STATEMENT OF THE CASE.

This action was brought by the respondents in the Court below to procure an injunction restraining the appellants from interfering with or diverting the waters of a stream called Avalanche Creek, and in the amended bill plaintiffs base their right to claim this interference of a Court of Equity by its extraordinary writ of injunction upon their ownership of farms (ranches) below this stream, and not alleged or claimed to be upon its banks, the necessity existing that they have water to make them productive, and their construction of a ditch conveying the waters of Avalanche Creek to their farms, for use thereon, for the purposes of irrigation. Upon these three facts, viz:—(A) the ownership of farms, barren but for water; (B) the necessity for water to make them productive; (C) and the construction of the ditch and use of the water for the period named—rest the affirmative rights of the plaintiffs below and the respondents here to the property, concerning which the equitable interference of the Court was prayed. The wrongs committed by the defendants and appellants consisted (D) of the erection of the dam and ditches mentioned, and (E) an alleged di-

version of the waters of Avalanche Creek from the head of the ditch of plaintiffs and respondents. As a result, the respondents allege that their farms, which were barren when possession of them was taken by respondents, continued barren, although in the interregnum—while the waters of Avalanche Creek flowed through their ditch—they were of great fertility.

To the bill alleging these facts the appellants interposed a demurrer, which, in the formula prescribed by the Civil Practice Act of the Territory, (sec. 40, pp 143 Stat. Montana, 1867,) substantially set forth that there was no equity in the bill. (See 2d cause of demurrer in RECORD, page 4.) Upon this issue of law the Court does not seem to have given judgment; but it was one which, if good, could not be waived under any system of practice, and, if the assumption of the Legislative authority of that Territory to regulate proceedings in equity as well as at law is valid, is expressly provided for. (See Stat. Montana, 1837, sec. 45, pp 143.)

The defendants answered, and in substance they denied, all the allegations of the amended bill of complaint except the ownership by detft's of the ranches alleged.

The case thus stood at issue by two answers, one in law and one in fact.

ARGUMENT.

We claim:

1. That the answer in law was a complete defense, and that upon it the Court below should have dismissed the bill, and this for the following reasons:

(A) From the amended bill of complaint it did not appear that the plaintiffs were the owners of the waters of Avalanche Creek, or had any interest in its flow down the bed of said creek to the head of their ditch, or elsewhere.

(B) Nor did it appear from the amended bill of complaint that the interference by defendants with the waters of said creek exceeded their legal right to it as riparian proprietors.

(C) If the last proposition had been otherwise, and their interference with it had been alleged to have been "unlawful" or "wrongful," still no one could have maintained an action against them for the trespass without showing that his lawful rights had been impaired by such wrongful act.

(D) The bill did not allege that the trespass complained of was committed *vi et armis*, or that it was wrongful. These allegations, it is submitted, were essential, had the plaintiffs only sought a remedy at law. Certainly when they came into a Court of Equity to invoke its aid; they could not content themselves with showing a mere legal liability,—a violation of their lawful rights by the defendants,—for in such event they would be remitted to their action at law therefor. But if either of the foregoing propositions be sustained, then they would have been turned from a Court of law without a remedy. Each of these defects is as fatal to a bill in chancery as to a declaration at law. But the presence of the plaintffs in a Court of Equity could only be justified by other facts than those essential to the maintenance of an action at law, and herein the amended bill of complaint is fatally defective. If all plaintiffs say as matter of fact be true, and the foregoing essential allegations be added, a Court of Equity would then remit them to their remedy at law.

Nowhere through the bill is there a statement of a conclusion, or of a fact, which would justify equitable interference. No allegation that the defendants are continuing the trespass alleged to have been committed, or threaten to continue the same, or

are taking any steps to continue the same, or that at the time of the commencements of the action the consequences of past trespasses continue, or that the defendants are insolvent, or that unless enjoined the defendants will commit irreparable injury, or that they have no plain, speedy and adequate remedy at law. Every allegation in the bill as to pretended wrongs by the defendants is of something already performed and concluded; every consequence inimical to the alleged rights of plaintiffs is of the past; all damage complained of has already transpired, and by no allegation do they allege that they do apprehend, or have cause to apprehend, further injury.

The "irreparable damage and injury," mentioned in the amended bill, is something claimed to have been already suffered, and is not put as something to be apprehended in the future from acts yet to be done or consequences yet to follow. The plaintiffs say that from 1867 to 1870, on certain days, defendants committed certain acts, resulting in damage to plaintiffs for which neither law nor equity afford them a remedy. Certainly the intervention of a Court of Equity was never yet justified on such grounds. An injunction upon such allegations can only be supported by subverting the principles which have heretofore justified its issuance, and by wholly disregarding the exclusive wrongs it was intended to remedy. Besides, it should be considered that it is in this class of cases that Courts of Equity must frequently exercise their discretion to refuse a remedy in cases of a clear violation of legal right, and remit the parties to their remedy at law.

The assertion of a title to water and the right to its exclusive control and use gives frequent occasion for those Courts which uphold such title to exercise a great prudence in granting writs of injunction. Many interests combine on many occasions to make plain the fact that water is so held for speculative purposes, or is of trifling value to the proprietor, or is conducted through ditches for such great distances that much of its volume is lost, while to others it is of great value, can be economically used, and that, too, for industries and purposes promotive of the general good, and in such cases the owners are remitted to their legal remedy.

The omission to allege that the acts complained of were "unlawful" or "wrongful" would not be fatal if facts were alleged from which the wrongful or unlawful character of the appellants' acts would necessarily be inferred. But where these facts are omitted, then the allegation of the "wrongful" character of the acts is necessary. For under such circumstances it is something more than a conclusion, it is the averment of a probative fact, as is shown by those decisions which hold that—where a party in the language of the bill denies that he wrongfully did the act complained of—it is an admission by the defendant that he did the act but puts in issue its character as being wrongful or otherwise. These decisions are numerous, and a reference to them unnecessary.

But we claim that this bill of complaint is defective in another and vital particular. It proceeds upon the theory that property in water, as something distinct and separate from the soil, may be acquired upon the public domain, that the riparian rights of proprietors of lands upon our streams may be disregarded, and that this element of mobile fertility may be subjected to the ownership and dominion of man for use whethersoever he may desire to take it by what they denominate "appropriation."

If the doctrine of appropriation could be defended in any combination of events,

version of the waters of Avalanche Creek from the head of the ditch of plaintiffs and respondents. As a result, the respondents allege that their farms, which were barren when possession of them was taken by respondents, continued barren, although in the interregnum—while the waters of Avalanche Creek flowed through their ditch—they were of great fertility.

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(C) If the last proposition had been otherwise, and their interference with it had been alleged to have been "unlawful" or "wrongful," still no one could have maintained an action against them for the trespass without showing that his lawful rights had been impaired by such wrongful act.

(D) The bill did not allege that the trespass complained of was committed *vi et armis*, or that it was wrongful. These allegations, it is submitted, were essential, had the plaintiffs only sought a remedy at law. Certainly when they came into a Court of Equity to invoke its aid; they could not content themselves with showing a mere legal liability,—a violation of their lawful rights by the defendants,—for in such event they would be remitted to their action at law therefor. But if either of the foregoing propositions be sustained, then they would have been turned from a Court of law without a remedy. Each of these defects is as fatal to a bill in chancery as to a declaration at law. But the presence of the plaintffs in a Court of Equity could only be justified by other facts than those essential to the maintenance of an action at law, and herein the amended bill of complaint is fatally defective. If all plaintiffs say as matter of fact be true, and the foregoing essential allegations be added, a Court of Equity would then remit them to their remedy at law.

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are taking any steps to continue the same, or that at the time of the commencements of the action the consequences of past trespasses continue, or that the defendants are insolvent, or that unless enjoined the defendants will commit irreparable injury, or that they have no plain, speedy and adequate remedy at law. Every allegation in the bill as to pretended wrongs by the defendants is of something already performed and concluded; every consequence inimical to the alleged rights of plaintiffs is of the past; all damage complained of has already transpired, and by no allegation do they allege that they do apprehend, or have cause to apprehend, further injury.

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The omission to allege that the acts complained of were "unlawful" or "wrongful" would not be fatal if facts were alleged from which the wrongful or unlawful character of the appellants' acts would necessarily be inferred. But where these facts are omitted, then the allegation of the "wrongful" character of the acts is necessary. For under such circumstances it is something more than a conclusion, it is the averment of a probative fact, as is shown by those decisions which hold that—where a party in the language of the bill denies that he wrongfully did the act complained of—it is an admission by the defendant that he did the act but puts in issue its character as being wrongful or otherwise. These decisions are numerous, and a reference to them unnecessary.

But we claim that this bill of complaint is defective in another and vital particular. It proceeds upon the theory that property in water, as something distinct and separate from the soil, may be acquired upon the public domain, that the riparian rights of proprietors of lands upon our streams may be disregarded, and that this element of mobile fertility may be subjected to the ownership and dominion of man for use whethersoever he may desire to take it by what they denominate "appropriation."

If the doctrine of appropriation could be defended in any combination of events,

still those events do not appear from this amended bill. But the appellants denyhat appropriation, as pleaded in this bill, gives a title to the appropriator. That a diversion of water from its natural channel for a period so long as to be protected by the statute of limitations would leave those who sought to complain remediless is true; but in this case the plaintiffs were not, and did not claim to be, thus protected. Their appropriation was in 1866, and the diversion of defendants in 1867-70, as alleged in the amended bill. The doctrine of appropriation is inconsistent with riparian rights, and the latter cannot exist where the former is maintained. One rests for its vindication upon the theory that priority in time gives priority in right, while the other reposes upon the principle that equality is equity. Between these two principles there is no ground to stand on, and one is necessarily destructive of the other.

The rights of the parties in this action are to be determined by the Common Law, or the Statutes of Montana as they were in 1866-7. The Legislative Assembly of Montana, at its first session, enacted:

"That the Common Law of England, so far as the same is applicable and of a "general nature and not in conflict with the special enactments of this Territory, shall "be the law and rule of decision, and shall be considered as of full force until repealed "by Legislative authority." (Laws of Montana 1864-5, pp 356.)

The legislation of that session was clearly inconsistent with the theory of appropriation. It provided for an equitable division of water to all, rather than a monopoly of it by one, (see ditto, 367,) and thus the law stood when the various rights of the parties herein accrued.

If riparian rights had been interfered with in any way by legislation in that Territory, such interference assuredly was not in the direction of "appropriation." Legislation had sought to secure equality of right not merely to owners of land along the streams, but it had sought to extend the right to those living remote from streams, in the valleys through which they ran. The enactments above referred to were the measure of the plaintiffs' and respondents' rights, and with those rights, as thus measured, their amended bill shows no interference by appellants. The act last above recited also prescribed their remedy. As the right of respondents was the creature of the statute, the remedy prescribed by it is exclusive, and they should have applied to the nearest Justice of the Peace to appoint commissioners to apportion them their share of the water. (See sec. 4, act last above referred to.)

The legislation of the Territory was therefore inconsistent with the doctrine of "appropriation" as claimed by the respondents, and the Act of Congress, approved July 26, 1866, (See vol. 14, U. S. Statutes at Large, pp 251,) did not operate to give respondents any rights to water or enlarge any rights theretofore held by them, for it only provided that these water rights should be "maintained and protected" when recognized and acknowledged by "laws."

We must still insist that this Court will presume that the local customs and decisions of the Courts in Montana were in conformity to local legislation, and that legislation enlarged rather than narrowed the number who were to be participants in the advantages of running water.

The establishment of the doctrine of an ownership in water by appropriation, as claimed by these respondents, would be fraught with grave consequences. Sections 16 and 36 of each township of the the public lands are recorded for school purposes

when the Territories shall become States. The occupancy of these lands or their sale is something not to be predicted in the near future. If they shall be denuded of the water which now flows through them by "appropriation," and left as sterile as the deserts of Arabia, a great deal of fine writing about the munificent endowment of the Common Schools of the future in at least seven Territories had better be blotted out. And while this argument is as to the expediency of the doctrine, it is not seen how the appropriation of water can be justified on any principle which will not also justify the appropriation of their forests or their grasses as a perpetual estate of the first comer.

It is not our purpose elaborately to argue the doctrine of appropriation of water or enlarge upon its infirmities as a title to the waters of streams taken out of their beds, and we content ourselves by referring to the following authorities:—*An Act to Provide a Temporary Government for the Territory of Montana, Approved May* 26, 1864; *Vol.* 13 *U. S. Statutes at Large, pp* 85, *Sec.* 6, *Sec.* 14; *Vansickle vs. Haines,* 7 *Nevada Reports, pp* 249, and cases there cited; also *Thorp vs. Freed,* 1*st Vol. Montana Reports, pp* 651, where the subject is discussed, if not decided.

For these reasons we conclude that the demurrer was well taken, and that in failing to pass upon and sustain it the Court erred.

This brings us to the motions of appellants for a dismissal of the bill upon the special findings of the Jury and the pleadings in the case. There were two motions filed—Basey, who seemed to occupy relations to the case personal to himself, severing from his co-defendants in these motions. (See pp 8 of RECORD.) These motions, like the demurrer, were not noticed by the court, but it proceeded to render a decree.

We claim that even were there no defects in the amended bill of complaint, the findings of the Jury show that the decree is erroneous.

We are not unmindful of the short-comings of this RECORD. The testimony which was introduced before the Jury does not accompany it. The Legislative Assembly of Montana has assumed to regulate the practice in Chancery cases as well as at Common Law. The issues submitted to the Jury were submitted pursuant to the practice so regulated by statute, and when the issues were returned by the Jury the Chancellor acted upon them as agreed facts in the case. Neither party moved to set aside any of its findings. The decree itself places this fact beyond doubt, for it closes with the express statement that "the * * decree is based upon the special findings of the Jury in this case and the pleadings therein." (See RECORD, page 10.) Some of the findings do not appear to be of material facts, and others, to be fully understood, should have been explained by the proof. But the Court excludes all proof in arriving at the decree, and bases it on these findings; and we submit that in this event the question is before this Court whether the decree is justified by these findings and the pleadings.

Had the Court sought the aid of a Jury by framing and submitting feigned issues and upon the return of such issues into Court fully answered and upon the pleadings and such issues decided by the Jury the Chancellor had proceeded to pass a decree, we submit that the RECORD would have been in a proper shape to be reviewed by an appellate Court, and if this is true, may we here properly enquire whether the facts before the Chancellor did not show that the defendants were entitled to a decree?

The defendant Basey does not seem to have been connected with the other defendants in any use or diversion of the water. See 14th interrogatory, pp 7, where for "priority," it is submitted, we should read "privity." As to Basey the decree is erroneous, because his diversion was protected by a contract with plaintiffs. See answer to 15th interrogatory, pp 7.) As to him it is further erroneous because the only facts found against him were that he had diverted the water in 1867, (see 13th interrogatory, pp 7,) and at some time not specified he had threatened to divert said water. (See 16th interrogatory.) And as to the other defendants the 17th interrogatory and answer wholly and completely exonerate them from any wrong whatever. None of them have directly or indirectly diverted water which could have been used by plaintiffs on their ranches. Perhaps it may be said that for clerical errors committed by clerks in the lower Courts it will not be admitted that said finding shows that said defendants never diverted "any water to which plaintiffs" "*were entitled*"—two words manifestly having been omitted from the interrogatory or omitted by copyists. In any event, as to Stafford and the Clems and Warners, they have interfered with no rights of plaintiffs, nor have they threatened to, but they are subjected to a perpetual decree against them and to the payment of costs.

Upon the proposition of a justification of this decree we do not think any claim can be made that it is supported by the findings. The most zealous supporter of it could only say that perhaps the error was not sufficiently saved. But according to the legislation of that Territory and the judicial interpretation of its highest Courts these errors were all properly saved, and it would seem if a new practice is to be prescribed to the judicial tribunals there by the decision of this Court, that such regulation of equity practice is not a rightful subject of legislation pertaining to the Territorial Legislative Assembly, that it should be so decided in unequivocal terms, and that until so decided no right should be lost to litigants who have followed the legislation and judicial decision of that Territory. The uses of injunctions are definitely understood, but the local practice of many States and Territories demonstrates that the function of a Court to grant injuctions is frequently abused. Their effectiveness and the superserviceable freedom with which local Courts have granted them encourage litigants to appeal for their issuance on the most flimsy pretexts, and for wholly inadequate causes. Notwithstanding these things are so, it is not believed that the instances are frequent where Courts, upon pleadings so imperfect as these, grant injunctions and mulct in costs defendants who, by the facts in the case, are so completely shielded from all apparent liability thereto as are these appellants.

And for these considerations, and upon this brief, the appellants submit their cause, asking a reversal of the case and a dismissal of the bill, or a remission of the cause for further hearing in the Court below.

W. F. SANDERS, *of Counsel for Appellants.*

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 126.

WILLIAM BASEY *et al.*, Appellants,

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JOHN GALLAGHER *et al.*

BRIEF OF COUNSEL FOR APPELLEES.

R. T. MERRICK,
For Appellees.

Judd & Detweiler, Printers.

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Statement.

In 1866 the complainants and their predecessors in interest and possession, took up for settlement and cultivation certain ranches on public land of the United States, situate in the county of Meagher, in the Territory of Montana, and from that time to the date of bringing suits they have occupied and cultivated, and still continue to occupy and cultivate, said ranches. The said ranches can be made productive *only by irrigation;* and at the time they were taken up as aforesaid the waters flowing in Avalanche creek or gulch were unappropriated, and complainants, by means of a water ditch constructed at great cost, conducted the waters of said creek or gulch to their said ranches for the purpose of irrigating the same, and have since continually used the said waters for said purpose, and now claim the right to the use of the same as *prior appropriators* thereof.

The defendants, well knowing the rights of the complainants and their predecessors to the waters of said stream, sub-

sequent to the appropriation thereof by said complainants, did, by means of a ditch constructed at a point on said stream above the ditch of complainants, divert the said waters, wholly depriving complainants of their use, and their said ranches being thereby deprived of the means for necessary irrigation are rendered unproductive and barren.

The complainants allege that the injury is irreparable, and ask that the defendants be enjoined.

The defendants specifically deny each and all the allegations in complainants' bill, but do not set up any right in themselves to the use of the waters of Avalanche creek, either derived directly by prior appropriation, or as incident to the ownership of soil adjacent to the stream.

The record does not show that either complainants or defendants have the legal title to any portion of the soil bounded by said stream or adjacent thereto; on the contrary, it is fairly to be inferred, from what the record does show, that the title to the entire valley through which the stream flows remains in the United States. And whilst it appears that the complainants have "*taken up certain ranches on the public land of the United States,*" and appropriated the waters of the stream for the useful and necessary purpose of irrigation, there is nothing to show in what right or for what purpose the defendants have assumed to divert the said waters.

Certain questions of fact arising in the case were submitted to a jury, and the court found a decree in favor of complainants, having "heard" and "decided" the case "*upon the pleadings, evidence and proceedings therein, including the findings of the jury.*"

Record, p. 9.

The opinion of the supreme court of the Territory affirming the decision of the court below will be found at page 12, Record.

I.

The first appropriation of the water of a stream passing through the public lands of the United States to some beneficial purpose confers the right to the use and enjoyment of the water to the extent of the original appropriation.

Irwin *vs.* Philips, 5 Cal., 140.
Bear River Co. *vs.* The York Mining Co., 8 Cal., 332.
Butte Canal Co. *vs.* Vaughan, 11 Cal., 152.
McDonald *vs.* Bear River Co., 13 Cal., 220.
Phœnix Water Co., *vs.* Fletcher, 23 Cal., 482.
Hill *vs.* Smith, 27 Cal., 476.
Smith *vs.* Hana, 43 Cal., 371.
Lobdell *vs.* Simpson *et al.*, 2 Nevada.
Ophir Mining Co. *vs.* Carpenter, 4 Nevada, 534.
Hobart *vs.* Ford, 6 Nevada, 80.
Dalton *vs.* Bowler, 8 Nevada, 201.

The question submitted must not be embarrassed by the principles governing the relative rights of riparian owners. Riparian rights are incident to the ownership of the soil. In this case there is no riparian owner except the United States, and the record does not show that either of the parties even occupy along the margin of the stream. The lands being open to appropriation the rule of time is the rule of right, and the first taken is to be protected in his entry and possession. There is no difference between an appropriation of land and an appropriation of water; both are open to appropriation, and the claim of priority is a valid claim, except as against the United States. Blackstone has enumerated water among those things the title to which could be acquired by occupancy. "If a stream be *unoccupied* I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's *prior* mill, or his meadow, for he hath

by his first occupancy acquired a property in the current." (2 Blackstone, 403.) In Williams *vs.* Morland, (2 Barn. & Cress., 913,) and in Liggins *vs.* Inge, (7 Bing., 692,) and in the earlier cases in Massachusetts and Connecticut a similar principle was announced. Later adjudications in England and the States last referred to, question and apparently overrule these decisions, and a different doctrine seems to have been established as the rule of the common law.

But all the cases by which it is established rest upon the fact that the right to the use of the water of the stream had never been detached as *property* from the ownership of the adjacent soil, and that such use was claimed and held only as a riparian right, and when the Government, as proprietor of the soil, transferred its title thereto without limitation directly in the grant, or by reason of prior grants, such transfer carried with it the necessary incident of riparian rights.

The legislation of the Federal Government and of the Territory of Montana relieves the question from all embarrassment.

By the ninth section of the act of Congress of July 26, 1866, (14 Stat. at Large, p. 253,) it is provided as follows:

"That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. And the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage, shall be liable to the party injured for such injury or damage."

This act clearly recognizes a right to the use of water as independent of any right or title to land, and assures protection to this right whenever it has "*vested*" by "*priority of possession*," provided the "local customs, laws and decisions of courts," recognize such a right and such a mode of acquiring it.

Congress is here dealing with the public domain, and it cannot be denied that "all the lands in the Territories not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, *to be disposed of to such persons, at such times, and in such modes, and by such titles as the Government may deem most advantageous* to the public, or in other respects most politic."

Irvine *vs.* Marshall, 20 Hd., 561.

By the act referred to the Government has disposed of its title to the water in streams running through the public domain to the prior appropriator thereof, subject to the conditions expressed in the act; and it has further provided for the protection of rights so acquired, as against the subsequent grantee of the Government.

By section 17, act of July 9, 1870, (p. 218, 16 Stat.,) it is provided as follows:

"That none of the rights conferred by sections 5, 8, 9 of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this is amendatory."

The question then arises is the case of the complainant within the provisions of the act of July 26, 1866?

Do the *local customs, laws and decisions* of the courts of Montana recognize the acquisition of a right to the use of the water of a stream by appropriation, as separate and distinct from the ownership of land adjacent to the stream, and is such right to be determined by the priority of possession among respective claimants?

The legislation of a State determines its policy, and custom is subordinate to the written law. It would seem, therefore, that where the legislative authority has given a clear and explicit rule as to any right of property, custom would be presumed to be in conformity with the rule so given. The statute would in fact establish the policy and custom of the State, and the decisions of the courts would furnish the best evidence of what was the custom as well as the law in respect of any particular right of property upon which they had undertaken to adjudicate. It would, therefore, seem clear that the conditions specified in the act of 1866 should be read in the disjunctive, and that where any one of them exists the claim of a party otherwise entitled to the protection of the act could not be denied.

But accepting the construction claimed in the brief of the counsel for the appellants, what is the fact as to the local customs, laws, and decisions of Montana, as they affect this question?

The act providing for a temporary government for the Territory of Montana was approved May 26th, 1864.

The Legislative Assembly of Montana at its first session, and on the same day on which it declared that the common law, so far as applicable and of a general nature, and not in conflict with the special enactments of the Territory, should be the law and rule of decision, passed the following act, January 12th, 1865. (First session acts, 367.)

An act to protect and regulate the irrigation of land in Montana Territory.

SECTION 1. That all persons who claim, own or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes.

SEC. 2. That when any person owning claims in such locality has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water necessary to irrigate his land, or that his farm or land used by him for agricultural purposes is *too far removed from* said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream for the purposes hereinbefore stated.

SEC. 3. That such right of way shall extend only to a ditch, dyke or cutting sufficient for the purposes required.

SEC. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all.

SEC. 5. That upon the refusal of owners of tracts of land through which said ditch is proposed to run to allow of its passage through their property, it shall be proper for any justice of the peace, upon application being made and proper notice being given to parties, as in other cases of litigation under the jurisdiction of a justice of the peace, to appoint three commissioners or reviewers, composed of disinterested claimholders within the townships, who shall proceed to view the premises, taking into consideration the necessities and rights of both parties, also the size of the cutting.

SEC. 6. That if the commissioners thus appointed shall think proper they shall proceed to assess any damage which said ditch may cause to the owner of the lands through which it passes, taking, also, into consideration any advantage which he may derive from said ditch.

SEC. 7. That said assessment upon its proper returns, sworn to, and properly certified, the justice of the peace shall proceed to render his judgment, based upon the assessment of the commissioners, as he would do in any action of debt which may come under his jurisdiction, and subject to the like mode of execution and enforcement. In case the damage shall exceed the jurisdiction of the justice of the peace, the commissioners shall report to the probate judge of the county, who shall proceed in the same manner as required of the justice of the peace.

SEC. 8. That all persons on the margin, brink, neighborhood, or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel or other machine, for the purpose of raising water to the level required for purposes of irrigation, and that the right of way shall not be refused by the owners of any tract of land upon which it is required, subject to the like regulation as required for ditches, and laid down in the preceding sections.

SEC. 9. That the said commissioners, as provided for in section 5, shall be allowed two dollars each per day for their services.

SEC. 10. That the provisions of the sections of this act shall not conflict with any rights of mills or mill men, or interfere with any milldam, race, or water-course which already exists.

SEC. 11. That the provisions of this act shall also entail upon the parties using water, as provided above, the careful arrangement and control of said water, that in their waste they shall not injure any one, and if so injured damages shall be assessed as hereinbefore provided.

SEC. 12. That this act do take effect from and after its passage.

[Approved January 12, 1865.]

It was under this act and the act of Congress of 1866, that the complainants acquired the rights in litigation in this case.

In the case of Thorp *vs.* Woolman, (1 Montana, p. 170,) it was held that the powers conferred on the commissioners to apportion water under the fourth section of the act, were judicial, and that the Legislature had transcended its power under the organic act of the Territory, in attempting to confer such functions upon an organization not a part of the judicial system of the Territory. This section was therefore declared to be void; but the rest of the act was left unimpaired and in full force, and the court says in its opinion that the act "*recognizes and establishes the doctrine of appropriation of water for irrigation.*" "The permission given by the act to take water out of its natural channel for purposes of irrigation, where it damages land-holders below the point where the water is diverted, is incompatible with the common law doctrine in case of riparian proprietors."

In 1870 the foregoing act of 1865 was repealed by an act more broadly and clearly defining the rights in question, and recognizing such as had been acquired prior to its passage, and specially providing in section 5 that all controversies respecting rights to water should be determined by the date of appropriation. The act is as follows:

AN ACT to repeal an act entitled "An act to protect and regulate the irrigation of lands in Montana Territory," approved January 12, 1865, and to make provision for the construction of ditches and the irrigation of agricultural lands.

SEC. 1. That an act entitled "An act to protect and regulate the irrigation of lands in Montana Territory," approved January 12, 1865, be, and the same is hereby, repealed.

SEC. 2. That any person or persons, corporation or company, who may have or hold a title or possessory right or title to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof.

SEC. 3. That when any person or persons, corporation or company, owning or holding land, as provided in section 2 of this act, shall have no available water facilities upon the same, or whenever it may be necessary to raise the water of said stream or creek to a sufficient height to so irrigate said land, or whenever such lands are too far removed from said stream or creek to so use the water thereof as aforesaid, such person or persons, corporation or company, shall have the right of way through and over any tract or piece of land for the purposes of conducting and conveying said water by means of ditches, dykes, flumes or canals, for the purpose aforesaid.

SEC. 4. That such right to so dig and construct ditches, dykes, flumes and canals over and across the lands of another shall only extend to so much digging, cutting or excavations as may be necessary for the purposes required.

SEC. 5. That in all controversies respecting the rights to water under the provisions of this act the same shall be determined by the date of the appropriation as respectively made by the parties.

SEC. 6. That the waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator, but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable.

SEC. 7. That any person or persons, corporation or company, damaging or injuring the lands or possessions of another, by reason of cutting or digging ditches or canals, or erecting flumes, as provided by section 3 of the act, the party so committing such injury or damage shall be liable to the party so injured therefor.

SEC. 8. That this act shall not be so construed as to impair or in any manner interfere with the rights of parties to the use of the water of such streams or creeks acquired before its passage.

SEC. 9. That this act shall not be so construed as to prevent or exclude the appropriation of the waters of the said streams or creeks for mining, manufacturing, or other beneficial purposes, and the right also to appropriate the same is hereby equally recognized and declared.

SEC. 10. That any person or persons, corporation, or company, who may dig and construct ditches, dykes, flumes, or canals, over or across any public roads or highways, or who use the waters of such ditches, dykes, flumes, or canals, shall be required to keep the same in good repair at such crossings or other places where the water from any such ditches, dykes, flumes, or canals, may flow over, or in any wise injure any roads or highways, either by bridging or otherwise.

SEC. 11. Any person or persons offending against section 10 of this act, on conviction thereof, shall forfeit and pay for every such offence a penalty of not less than twenty-five dollars nor more than one hundred dollars, to be recovered with costs of suit in civil action, in the name of the Territory of Montana, before any court having jurisdiction; one half of the fine so collected shall be paid into the county treasury for the benefit of the common schools of the county in which the offence was committed, and the other half shall be paid to the person or persons informing the nearest magistrate that such offence has been committed. All such fines and costs shall be collected without stay of execution, and such defendant or defendants may, by order of the court, be confined in the county jail until such fine and costs shall have been paid.

SEC. 12. This act to be in force and take effect from and after its approval by the governor.

Laws, Sixth Session, p. 57.

In 1871 and 1872, when the statutes of Montana were revised, and a code of laws and practice was established for the Territory, the act last above referred to and quoted was incorporated into the system and re-enacted as part of it.

Laws of Montana; Codified Statutes, 1871 and '2, page 498.

It is apparent from this review of the legislation of Montana that the "laws" of that Territory fully "recognize and establish" that "rights to the use of water for agricultural purposes" may be acquired and become vested by priority of possession.

The "local customs and decisions of the courts" of the Territory also recognize and establish a similar rule of property.

In the case of Thorp *vs.* Freed, (1 Montana, 355,) Knowles, J., says:

"Ever since the settlement of this Territory it has been the custom of those who settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture to dig ditches and turn out the water of some stream to irrigate the same. This right has been generally recognized by our people. *It has been universally conceded that it was a necessity of agricultural pursuits.* So universal has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory that has not been irrigated by water diverted from some running stream."

Wade, C. J., in a separate opinion in the same case, denies that any custom exists recognizing the right to appropriate water for the purposes of agriculture and irrigation, whilst, apparently admitting the existence of the custom as applied to mining and the mineral lands of the public domain.

But if a usage exists recognizing the right to divert and and appropriate water, the *purpose* for which the appropriation may be made is immaterial, provided it be useful or beneficial and not for speculation.

Ortman *et al. vs.* Dixon, 13 Cal., 33.
Davis *vs.* Gale, 32 Cal., 26.
Woolman *vs.* Garringer, 1 Montana, 535.

Has this right been recognized by the courts?

The cases referred to show that it has been uniformly recognized and established in California and Nevada, and

the courts of Montana have, on this subject, followed the decisions of the courts of those States.

Caruthers *vs.* Pemberton, 1 Montana, 111, 113.
Thorp *vs.* Woolman, *Ib.*, 171, 172.
Woolman *vs.* Garringer, *Ib.*, 535, 543.
Atchison *vs.* Peterson, *Ib.*, 564.

II.

An injunction to restrain the defendants from diverting the waters of Avalanche creek, to the use of which complainants alleged they had become entitled by priority of appropriation, was the only relief asked by complainants, and the only relief granted in the decree rendered. The case was, therefore, a case in equity, and exclusively within the jurisdiction of a court of equity, and in such a case the decree should proceed from the judge sitting as a chancellor, and be an expression of his own opinion of the facts established by the evidence, and may or may not conform to the finding of the jury, according to his judgment in the premises.

The proceedings as set out in the record show that the case was tried as a chancery case, and the decree is in the usual form of decrees in chancery.

Certain issues were submitted to a jury, but only to aid the chancellor in ascertaining, from the evidence before him, the ultimate facts upon which to rest his decree, but not to control his judgment by the verdict, as appears from the decree itself.

After the ordinary formal commencement the decree continues, "And this cause, coming on the day of July, A. D. 1871, to be heard and decided by this court upon the pleadings, *evidence*, and proceedings therein, including the findings of the jury, * * * * and hearing what was alleged by the counsel on both sides, and upon the pleadings, *evidence*, and proceedings in the case, including the findings

of said jury, filed as aforesaid, *and it appearing from the premises to the satisfaction of this court,*" &c., &c., "therefore it is ordered, adjudged, and decreed," &c., &c.

It appears from the decree that *evidence* was taken and submitted to the court, and that upon the *evidence so submitted*, together with the other proceedings in the case, the decree was founded.

The statement following after the conclusion of the decree that "*The foregoing decree is based upon the special findings of the jury in this case, and the pleadings therein,*" forms no part of the decree, and is at variance with the averments in the body of the decree, and with the statements and reasoning of the judge by whom the decree was rendered in the opinion delivered by him as chief justice of the appellate court in deciding the case on review in that tribunal.

Record, pp. 11, 12, 13.

The case was taken by appeal to the supreme court of the Territory.

"Every final judgment, order or decision of a district court, *except in chancery*, may be examined upon a writ of error in the same court for error in fact, in the supreme court for error in law."

1st Session Acts of Montana, 1865, p. 101.

Although, by the laws of Montana, there is but one *form* of civil action, which is required to be "the same at law and in equity," the two jurisdictions are not necessarily blended and merged, but are recognized as separate and distinct, and may be exercised as separate and distinct from each other in all cases, subject to either the one or the other, and equitable or legal relief administered according to the rules appertaining to them respectively.

In the case of Hornbuckle *vs.* Toombs, (18 Wall.,) it was held by this court that the intermingling of legal and equitable remedies in one form of action was not erroneous, but

it was not decided that they *must* be intermingled, or that a case at law should not be tried as a law case, or that a case in equity should not be tried as an equity case.

The supreme court of Montana, in reviewing the case now before the court, discuss this question with great care and ability, and give a clear exposition of the rules of practice affecting it.

Record, pp. 13, 14, 15.

The act of the Territorial Legislature of 1867, (sec. 155,) providing that "an issue of fact shall be tried by a jury unless a jury is waived or a reference ordered, as provided in this act," cannot be understood as extending to cases in equity and was never so understood and treated by the courts of Montana, as appears from the opinion of the court in this case.

The organic act of the Territory recognizes the jurisdictions of law and chancery as distinct from each other, though directed to be administered by the same court, and such construction must be given to the act of 1867 as will make it consistent with a legitimate exercise of legislative power.

Dunphy *vs.* Kleinsmidt, 11 Wall.

The language employed in the act is general and similar to the language used in the provisions of various State laws and constitutions, securing a trial by jury in cases affecting rights of property, none of which were ever construed as having relation to proceedings in equity. If it has any relation at all to issues of fact in equity cases, it has the force and effect only of securing the right to a jury trial to any party who may demand it, without giving the verdict a necessarily controlling authority over the judgment of the chancellor.

It should receive such construction as will not only bring it within the just limits of the authority by which it was

adopted, but such also as will make it harmonize with the established forms and principles of law.

To guard against any possible misconstruction of this act, and make it conform by express limitation in words to the construction it had uniformly received in practice, the Legislative Assembly of Montana, in revising the code of practice of the Territory, provided that "an issue of fact *in an action at law* shall be tried by a jury unless a jury be waived or a reference ordered, as provided in this act."

Codified Statutes, 1871–'2; p. 64, sec. 190.

This case arises under a law of the United States, directly from which complainants claim that they derive the title or right in litigation. Whatever may be the authority of the Legislative Assembly of a Territory in dealing with the proceedings and remedies of courts of law and equity, cases belonging to this class must be heard and determined according to the established modes of procedure appertaining to these jurisdictions respectively.

Hornbuckle *vs.* Toombs, 18 Wall.

III.

It is shown from the record, and admitted in the brief of Mr. Sanders, one of the counsel for the appellants, that evidence was taken in the case, and submitted to the court, which is not in the record. The appellant assumes the burthen of showing affirmatively that there is error in the decree, and in the absence of such evidence as will satisfy the court that a decree different from that brought up should have been rendered in the case, the decision below will be affirmed.

Grant *vs.* Morse, 22 New York, 323.

Phelps *vs.* McDonald, 26 New York, 82.

R. T. MERRICK,
For Appellees.